Supreme Court, U.S.
FILED

No. 04-

04 468 OCT 04 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AG INDUSTRIAL MANUFACTURING INC.
and CLAUDE E. BROWN,

Petitioners,

v.

WATERKEEPERS NORTHERN CALIFORNIA,
a non-profit corporation dba DELTAKEEPER
and BILL JENNINGS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS G. MOUZES*
DENNIS M. HAUSER
HAUSER & MOUZES,
A PROFESSIONAL LAW CORPORATION
18826 N. Lower Sacramento Rd.
Suite H
P.O. Box 1397
Woodbridge, CA 95258-1397
(209) 368-1368

* *Counsel of Record*

Attorneys for Petitioners

189723

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The United States Court of Appeals for the Ninth Circuit reversed the district court's determination that it lacked subject matter jurisdiction over a private citizen's action seeking to enforce provisions of the Clean Water Act ("the Act"), 86 Stat. 816, 33 U.S.C. §§ 1251, *et seq.* and the General Permit issued by the State of California. Standing to initiate such an action exists if certain pre-suit notice conditions contained in 33 U.S.C. § 1365(b)(1)(A) as augmented by regulation promulgated by the Administrator of the Environmental Protection Agency ("EPA") at 40 C.F.R. § 135.3(a) are satisfied. In that context, the pending Petition presents the following issues:

1. Whether the required 60 day notice of intent-to-sue establishes standing and subject matter jurisdiction when petitioners, who in advance of the sending of the notice made no efforts to comply with the Act or California's General Permit, upon receipt of the 60-day notice and in advance of the filing of respondents' complaint took steps to place the light industrial manufacturing facility owned by petitioner Ag Industrial Manufacturing, Inc. ("Aim") in compliance with the Act and California's General Permit.

2. Whether respondents can assert in "good-faith" that the 60-day intent-to-sue notice supplies adequate notice of the "specific standard, limitation or order alleged to have constituted a violation" and the dates of alleged violations within the requirements of 40 C.F.R. § 135.3(a) so as to confer standing and subject matter jurisdiction where: (i) California's General Permit provides that a light industrial facility of the type owned by Aim is not subject to any effluent limitations for storm water discharged from that facility;

(ii) respondent Bill Jennings testified he once saw an Aim employee using a hose to wash something but never saw that non-storm water discharge exit the Aim facility; (iii) respondents never collected samples, much less tested for pollutants, of storm water being discharged into the protected waterway; and (iv) respondents supplied an incomplete and contradictory list of dates and amounts of rainfall at two rainfall stations at least 15 miles from Aim's facility asserting in their notice that wrongful storm water discharge occurs each calendar day that rainfall exceeds one-tenth of one inch which assertion is subsequently invalidated by the testimony of respondents' expert witness.

LIST OF PARTIES

The parties are as listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Ag Industrial Manufacturing, Inc. ("Aim") is a California corporation. It has no parent or subsidiary corporation. No publicly held company has any ownership interest in Aim. Aim has two shareholders being Paul Burkner and petitioner, Claude E. Brown, who is Aim's President.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF CONTENTS	iv
TABLE OF CITED AUTHORITIES	vi
TABLE OF APPENDICES	x
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	9
I. REVIEW IS WARRANTED TO AVOID UNNECESSARY EXHAUSTION OF JUDICIAL RESOURCES AND ENCOURAGE VOLUNTARY COMPLIANCE WITH THE ACT.	12

Contents

Page

A. The Ninth Circuit Has Destroyed the EPA Requirement that Notice Be "Specific" In Describing the Alleged Violation to Include the Dates of Violation. 12

B. Subject Matter Jurisdiction Can Only Be Determined Based Upon Facts that Exist on the Date the Complaint Is Filed. ... 16

C. The EPA's Requirement that the Notice Be "Specific" Must Be Upheld So that a Determination Can Be Made that Alleged Violations of the Act Are Made in "Good-Faith". 21

CONCLUSION 23

TABLE OF CITED AUTHORITIES

Page

Cases:

Arizonans for Official English v. Arizona,
520 U.S. 43, 117 S. Ct. 1055, 137 L. Ed. 2d 170
(1997) 19

Bender v. Williamsport Area School Dist.,
475 U.S. 534, 106 S. Ct. 1326, 89 L. Ed. 2d 501
(1986) 19

Cmty. Ass'n for Restoration of the Env't v.
Henry Bosma Dairy,
305 F.3d 943 (9th Cir. 2002) 14

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay
Foundation, Inc.,
484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306
(1987) ..... *passim*

Hallstrom v. Tillamook County,
493 U.S. 20, 110 S. Ct. 304, 107 L. Ed. 2d 237
(1989) 10

KVOS, Inc. v. Associated Press,
299 U.S. 269, 57 S. Ct. 197, 81 L. Ed. 183 (1936)
..... 17

Land v. Dollar,
330 U.S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209
(1947) 16-17

Cited Authorities

Page

Mansfield, C.&L.M.R. Co. v. Swan,
111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884) 19

McNutt v. General Motors Acceptance Corp.,
298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936) 17

Mitchell v. Maurer,
293 U.S. 237, 55 S. Ct. 162, 79 L. Ed. 3381 (1934) 19

Mollan v. Torrance,
9 Wheat. 537, 6 L. Ed. 154 (1824) 16

Natural Res. Def. Council v. Southwest Marine, Inc.,
236 F.3d 985 (9th Cir. 2000) 12, 13, 14

Ruhrgas AG v. Marathon Oil Co.,
526 U.S. 574, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999) 19

San Francisco BayKeeper, Inc. v. Tosco Corp,
309 F.3d 1153 (9th Cir. 2002) 14, 15

Smith v. Sperling,
354 U.S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957) 16

Cited Authorities

Page

Steel Company v. Citizens For a Better Environment, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) 10, 18, 19

St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938) 16

Thomson v. Gaskill, 315 U.S. 442, 62 S. Ct. 673, 86 L. Ed. 951 (1942) 17

United States v. SCRAP, 412 U.S. 669, 93 S. Ct. 2405, 37 L. Ed. 2d 254 10

WaterKeepers Northern California v. AG Industrial Manufacturing, Inc., 375 F.3d 913 (9th Cir. 2004) 1, 15, 17

Federal Statutes:

40 C.F.R.
Subchapter N
§ 122.2 6
§ 122.26(c) 5
§ 135.3(a) ..... i, 4, 5, 10

Cited Authorities

	Page
28 U.S.C.	
§ 1254(1)	1
§ 1291	1
33 U.S.C.	
§ 1251	i
§ 1342(b)	5
§ 1342(p)	5
§ 1365(a)	1, 5, 16
§ 1365(b)(1)(A)	i
42 U.S.C.	
§ 6972	10
§ 11406(a)(1)	10
U.S.C.A. Const. Article III, § 2	10
State Statutes:	
Cal. Water Code § 13370	5
Other:	
California Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES General Permit No. CAS000001	5, 6, 8, 21
Federal Rules of Civil Procedure Rule 11	22

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed July 16, 2004 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court Eastern District Of California Filed December 3, 2002 ..... 19a

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *WaterKeepers Northern California v. AG Industrial Manufacturing, Inc.*, 375 F.3d 913 (9th Cir. 2004). *See* Appendix A at 1a. The Ninth Circuit reversed the unreported December 3, 2002 Memorandum and Order of the United States District Court for the Eastern District of California (*see* Appendix B at 19a) upon which a judgment of dismissal was entered.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 33 U.S.C. § 1365(a). The Ninth Circuit's jurisdiction existed pursuant to 28 U.S.C. § 1291. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Ninth Circuit's opinion was rendered on July 16, 2004.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 33 United States Code, Section 1365

Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf —

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced —

(1) under subsection (a)(1) of this section —

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action, in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under the section respecting a violation of sections 1316 and 1317(a) of this title. *Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.* [emphasis added]

. . .

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title;

(6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

. . .

Title 40, Code of Federal Regulations, Section 135.3(a)

Notice regarding an alleged violation of an effluent standard or limitation or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the specific standard, limitation or order alleged to have constituted a violation, the person or persons responsible for the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

STATEMENT OF THE CASE

1. On June 28, 2000, respondents attempted to comply with 33 U.S.C. § 1365(a) and 40 C.F.R. § 135.3(a) by mailing their 60-day intent-to-sue letter (hereafter, "the Notice") to petitioner Aim. It is undisputed that in advance of that mailing, Aim had made no effort to comply with the Act and California's General Permit.[1]

The Act is administered largely through the National Pollution Discharge Elimination System ("NPDES") permit program. *See* 33 U.S.C. § 1342(p). Much of the responsibility for administering the NPDES permit system has been delegated to the states. *See* 33 U.S.C. § 1342(b) and Cal. Water Code § 13370 (expressing California's intent to implement its own NPDES permit program.) Pursuant to 40 C.F.R. § 122.26(c), California has issued one general permit to cover industrial dischargers who are not subject to the specific effluent limitations set forth in 40 C.F.R., Subchapter N. California Water Resources Control Board, Water Quality Order No. 97-03-DWQ: NPDES General Permit No. CAS000001 ("the General Permit").[2]

---

1. While irrelevant to the pending petition, petitioners assert that until receipt of the Notice they were ignorant of the potential applicability of the Act and the General Permit to the Aim facility.

2. The Order issuing the General Permit specifically provides that there are no numerical effluent limitations as follows:

> 9. For facilities which do not have established effluent limitation guidelines for storm water discharges in 40 C.F.R. Subchapter N, it is not feasible at this time to establish numeric effluent limitations. This is due to the large number of discharges and the complex nature of storm water discharges.

General Permit Order, Addendum at ¶ 9, p. 14.

To elect coverage under the General Permit, individual dischargers must file a notice of intent with the state. General Permit at 1-2 ¶ 3. Thereafter, the discharger must develop and implement a Storm Water Pollution Prevention Plan ("SWPPP") and develop and implement a comprehensive storm water discharge monitoring, sampling[3] and reporting program. General Permit at 24-25 ¶¶ B.1-B.15. The SWPPP has two major objectives: (a) to identify and evaluate pollutant sources associated with industrial activity which may affect the quality of water discharge; and (b) to identify and implement best management practices ("BMPs") to reduce or prevent pollutants associated with industrial activities in water discharge. General Permit at 11, ¶ A.2. BMPs are defined at 40 C.F.R. § 122.2 and a listing of potential non-structural and structural BMPs is set forth in the General Permit at 19-21, ¶¶ A.8.

Aim is a small light industrial manufacturing facility with a net worth of less than $1 million. Aim is located in the City of Lodi, California, approximately one mile from the Mokelumne River which the Notice specified as being the protected waterway affected by Aim's alleged wrongful discharge. Aim storm water discharge does not directly flow to the Mokelumne River but some storm water discharge may reach the Mokelumne River through the City of Lodi's storm drain system. Aim sells agricultural equipment manufactured by it or others primarily focusing upon the wine grape industry employing approximately 40 people at peak season.

---

3. Samples are to be collected at least twice during the "wet" season and are to be analyzed by a certified laboratory for certain specified elements such as total suspended solids as well as any toxic chemicals and other pollutants that are likely to be present in significant quantities. General Permit at 27, ¶ B.5.c.

Aim also services and repairs the equipment which it manufactures or sells although frequently such activity occurs in the field.

Respondents' Notice correctly asserted that as of June 28, 2000, Aim had not filed a notice of intent, prepared a SWPPP or developed and implemented a comprehensive storm water monitoring and reporting program. Respondents conducted no analysis of storm water discharge from the Aim facility. Respondents conducted no analysis of storm water discharge into the Mokelumne River at the point the City of Lodi's storm drain system discharged into that waterway. Respondent Bill Jennings saw an Aim employee using a hose to wash something (i.e., non-storm water); however, Mr. Jennings did not see any non-storm water discharge leaving the Aim facility.[4]

Nevertheless, respondents' Notice further asserted that on unspecified dates Aim illegally discharged non-storm water whenever equipment was hosed down and illegally discharged storm water whenever daily rainfall exceeded one-tenth of one inch as reflected on enclosed rainfall data. That data purported to reflect rainfall events by date and amount occurring at two separate reporting stations both of which were more than 15 miles from the Aim facility. The data was frequently incomplete and contradictory. Steven Bond, respondents' expert witness, admitted at his deposition that it was incorrect to assert that storm water discharge of one-tenth of one inch was sufficient the generate sufficient flow to reach the Mokelumne River and that .19 inch must occur for such discharge to reach the protected waterway.

---

4. Mr. Jennings conducted his initial drive by inspection of the Aim facility on August 8, 1999 or nearly one year in advance of sending the Notice.

Upon receipt of the Notice, petitioners immediately retained the services of Dan Barber, a professional engineer, to get the Aim facility into compliance and filed a notice of intent for Aim with the State of California on July 7, 2000. By July 21, 2000 Aim had developed a SWPPP which contained several BMPs as well as a storm water discharge monitoring[5] and reporting program. Respondents knew of Aim's notice of intent and had received a copy of Aim's SWPPP before they filed their Complaint initiating the pending case.

Respondents assert that so long as the Notice in good faith asserted on the date it was mailed that Aim's facility was not in compliance with the General Permit, it is irrelevant to the issue of subject matter jurisdiction and standing what steps Aim had taken to get into compliance with the Act before the respondents filed their Complaint.

2. Respondents filed their Complaint in the United States District Court for the Eastern District of California [Sacramento Division] on September 12, 2000. Even though respondents knew of Aim's filed notice of intent and had a copy of Aim's SWPPP, that Complaint asserts several distinct claims of violation of the Act through the failure to file a notice of intent, the failure to adopt a SWPPP, the failure to adopt and implement a storm water monitoring and reporting program and wrongful discharge of storm water and non-storm water. Respondents thereafter filed their motion for summary judgment requesting an award of civil penalties of $5,000,000. In response, on March 29, 2002, petitioners filed

---

5. Under the General Permit, monitoring of storm water discharge is only required during day light hours at scheduled facility operating hours within the "wet" season commencing October 1 and concluding May 30. General Permit at 26, ¶¶ B.4.a and 4.b.

their motion for summary judgment a portion of which suggested that the Notice was inadequate so that the district court lacked jurisdiction. The district court agreed and entered its Memorandum and Order on December 3, 2002 upon which a judgment of dismissal was entered.

3. Respondents filed their Notice of Appeal to the Ninth Circuit Court of Appeals on December 31, 2002. The Ninth Circuit's decision reversing the district court was entered on July 16, 2004.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit position that the sole criteria to determine that subject matter jurisdiction and standing exists is whether respondents' subjective good faith exists in the accuracy of their intent-to-sue notice on the date it was mailed appears at variance with at least two earlier decisions of this Court.

In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (hereafter, "*Gwaltney*"), 484 U.S. 49, 60, 64-66, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987), this Court determined that, among other things, the purpose of the intent-to-sue notice was to allow an opportunity for voluntary compliance thereby avoiding the need to file and prosecute a private citizen's enforcement action. Inherent in *Gwaltney* is that efforts of a party alleged to be in violation of the Act to get into voluntary compliance is indeed extremely relevant on the issue of the effectiveness of the Notice at the time the Complaint is filed so that subject matter jurisdiction may become the subject of attack in a properly filed summary judgment motion if a party alleged to be in violation promptly acts to get into compliance. Indeed, the Court commented:

> . . . [I]f the plaintiffs' allegations of [standing] were in fact untrue, then the [defendants] should have moved for summary judgment on the standing issue and demonstrated . . . that the allegations were sham and raised no genuine issue of fact.

Gwaltney, supra, 484 U.S. at 66 quoting from *United States v. SCRAP*, 412 U.S. 669, 689, 93 S. Ct. 2405, 2417, 37 L. Ed. 2d 254.

In *Steel Company v. Citizens For a Better Environment* (hereafter, "*Steel Co.*"), 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) this Court determined that the 60-day intent-to-sue notice contained in a similar statute[6] which properly asserted a statutory violation when it was mailed would not support U.S.C.A. Const. Article III, § 2 standing where, upon receipt of the notice and before the complaint was filed, the alleged violator took steps which placed it in compliance.

Further, this Court has ruled that the notice requirements of another like type statute[7] permitting private citizen's enforcement actions must be strictly construed and complied with. *Hallstrom v. Tillamook County*, 493 U.S. 20, 110 S. Ct. 304, 107 L. Ed. 2d 237 (1989). The content of the notice is important and must advise the alleged violator of what conduct violates the Act and when that conduct occurred. 40 C.F.R. § 135.3(a) requires that the notice be

---

6. The Emergency Planning and Community Right-To-Know Act of 1986, 100 Stat. 1755, 42 U.S.C. § 11406(a)(1).

7. Resource Conservation and Recovery Act of 1976, 90 Stat. 2825, 42 U.S.C. § 6972.

"specific". This requirement should be strictly construed and require "good-faith" efforts on the part of the sender to avoid mere speculation and conjecture by both identifying the specific standards violated and supplying all known material facts upon which the assertion of violation is made. In the context of only sixty days within which cure may be possible, specific information is required so that the alleged violator can quickly evaluate its alleged wrongful conduct and determine whether cure is possible so as to avoid unnecessary litigation.

Simply stated, how can the proper policy of avoiding unnecessary litigation and burden on the judicial system be achieved if a court looks solely to the state of events that existed at the time the intent-to-sue notice was sent as opposed to the state of events at the time the Complaint is filed. Such an approach completely ignores the 60-day grace period mandated by Congress.

This Court's guidance on the issue of the effectiveness of notice to support jurisdiction over a private citizen's action is urgently needed. New light industrial manufacturing companies who may become potentially subject to the Act start up every day. Further, California's General Permit has been recently revised so as to require, for the first time, all farming activities in California to comply with the General Permit. Specific to petitioners, they should not be required to go forward with the burden of obtaining summary judgment on the merits or even trial.

The Ninth Circuit's attitude concerning the time at which jurisdiction attaches is as of the date of sending of notice likely makes litigation inevitable and specifically rejects the notion that cure is possible before a complaint is filed.

Subjecting an alleged violator to the reality of litigation even if full compliance with the Act and California's General permit is achieved in advance of the complaint being filed does not promote the policy of encouraging voluntary compliance. Indeed, if confronted with the inevitability of litigation, the alleged violator may elect to litigate and delay compliance efforts. Any delay in compliance potentially exacerbates delay in achieving the objectives of the Act which will lead to less stress to the country's natural resources through reduced discharge of contaminants into protected waterways.

I. REVIEW IS WARRANTED TO AVOID UNNECESSARY EXHAUSTION OF JUDICIAL RESOURCES AND ENCOURAGE VOLUNTARY COMPLIANCE WITH THE ACT.

A. The Ninth Circuit Has Destroyed the EPA Requirement that Notice Be "Specific" In Describing the Alleged Violation to Include the Dates of Violation.

Natural Res. Def. Council v. Southwest Marine, Inc., 236 F.3d 985 (9th Cir. 2000) reflects the Ninth Circuit's relaxed attitude towards the adequacy of notice to support a private citizen's action. The alleged violator operated a large shipyard which removed old paint from ships and then repainted them having received a NPDES permit and a supplemental General Industrial Permit which applied to storm water discharge. Both permits required adoption of BMPs. A SWPPP was also required which must include certain specified material. The permits required that the SWPPP require that the defendant perform daily inspections to ensure compliance with its BMPs and maintain records of those inspections.

Id. at 992. Among other things, plaintiff's intent-to-sue letter asserted that the defendant was not conducting the daily inspections or maintaining records of those inspection. Shortly before the complaint was filed, the defendant adopted an amended SWPPP which attempted to address and correct various shortcomings described in plaintiffs' notice letter. At trial, the court determined the amended SWPPP was adequate; however, convincing evidence was presented that the defendant did not conduct the required daily inspections and even if it did, it did not maintain records of those inspections. *Id.* at 993.

Plaintiff's intent-to-sue letter did not provide specific dates of alleged violation. Rather it specifically described how the existing SWPPP failed to comply with the defendant's storm water permit by failing to perform daily inspections and maintain records of those inspections. On appeal, the Ninth Circuit correctly determined that subject matter jurisdiction existed; however, in doing so the Ninth Circuit addressed an issue which was unnecessary to the determination of liability given the trial court determination that there existed an ongoing and continuous failure to inspect and maintain records of those inspections. That issue was whether subject matter jurisdiction was lost as a consequence of the defendant adopting an amended adequate SWPPP after receipt of the intent-to-sue notice but in advance of filing the complaint. The Ninth Circuit held:

> If a defendant receives a proper notice letter alleging that it has failed to prepare and implement an adequate plan and, in response, prepares a new plan and begins to implement it before the complaint is filed, is the otherwise proper notice letter defective for failing to identify and discuss

> the new plan and its implementation? In those circumstances, must a citizen-plaintiff send a new notice letter? We think not. *Subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant.* [emphasis added]

Id. at 997.

Cmty. Ass'n for Restoration of the Env't v. Henry Bosma Dairy, 305 F.3d 943 (9th Cir. 2002) involved two dairies operated by the defendant who was subject to specific effluent guidelines upon which the defendant had obtained an individual permit for storm water discharges. There was a long history of compliance problems. The State of Washington then adopted a General Dairy Permit which contained specific discharge limitations for dairies who elected to be covered by this Permit. Plaintiff's intent-to-sue letter described 12 specific violations of the General Dairy Permit. Plaintiff's complaint sought statutory penalties not only for the 12 violations identified in its notice letter but also 32 additional like type alleged violations. At trial, a total of 16 violations were ultimately established. The Ninth Circuit held that so long as the initial intent-to-sue letter was broad enough to encompass additional like type discharge violations and the additional alleged violations were "from the same source, were of the same nature, and were easily identifiable", no new notice was required and those additional claims could be included in the assessment of civil penalties. *Id.* at 950-53.

San Francisco BayKeeper, Inc. v. Tosco Corp, 309 F.3d 1153 (9th Cir. 2002) involved the unloading and storage of petroleum coke by the defendant. Plaintiff's intent-to-sue letter asserted that a violation occurred each time coke was spilled during ship unloading and supplied fourteen dates

when ships had been docked at the defendant's facility. The notice also asserted wrongful discharge "occurred on each day when the wind [was] sufficiently strong to blow coke" from storage piles into a nearby waterway. The notice further asserted whenever rain exceed one-tenth of an inch wrongful storm water discharge containing petroleum coke also occurred and supplied a list of 190 dates when rainfall exceeded one-tenth of an inch. *Id.* at 1158. The Ninth Circuit held that where an alleged violation is continuous and ongoing, the notice need not contain specific dates and, in any event, the dates of unloading of petroleum coke and when the wind blew was presumptively known to the defendant.

The Ninth Circuit's rule that whenever the alleged violation is continuous and ongoing the dates of violation either need not be stated or are presumptively known to the defendant was specifically applied to petitioners when the Ninth Circuit commented the respondents were "not required to include any rain tables under *San Francisco BayKeeper*" [375 F.3d at 918][8] and "AG Industrial is in a much better position to know when it periodically washes down areas of its facility" [375 F.3d at 919]. Effectively the Ninth Circuit has adopted a rule which states that all an intent-to-sue letter to a light industrial company not subject to specific effluent limitations need contain is a very general statement that the company violated the General Permit and the Act every time it rains or every time it allows an employee to turn on a hose for any period of time for whatever purpose and that these violations are continuous and ongoing. Not only does this rule stand in apparent disregard of the EPA regulation controlling the required contents of the intent-to-sue notice,

8. These rain tables were apparently supplied in an effort to supply date specific information when rainfall may have exceeded one-tenth of one inch at the Aim facility.

it also effectively eliminates consideration at any stage of the litigation that specific substantive allegations of violation must be made in good faith so that jurisdiction exists.

B. Subject Matter Jurisdiction Can Only Be Determined Based Upon Facts that Exist on the Date the Complaint Is Filed.

In *Gwaltney*, this Court commented that the "to be in violation" language of § 505(a)(1) of the Act, 33 U.S.C. § 1365(a) together with the remaining statutory language of the Act involving "the pervasive use of the present tense" compelled the conclusion that

> . . . the harm sought to be addressed by the citizen suit lies in the present or the future, not in the past.

Gwaltney, supra, 484 U.S. at 59

Determining subject matter jurisdiction solely upon the adequacy of the intent-to-sue notice upon the date it was sent, an event in the past, as opposed to the date the complaint is filed is patently flawed. Subject matter jurisdiction "depends on the state of things at the time of the action brought". *Mollan v. Torrance*, 9 Wheat. 537, 539, 6 L. Ed. 154 (1824); *see, e.g., Smith v. Sperling*, 354 U.S. 91, 93 n.1, 77 S. Ct. 1112, 1113 n.1, 1 L. Ed. 2d 1205 (1957); *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289-90, 58 S. Ct. 586, 590-91, 82 L. Ed. 845 (1938). Subject matter jurisdiction can be called into question either by challenging the sufficiency of the allegation or by challenging the accuracy of the jurisdictional facts alleged. *See, e.g., Land v. Dollar*, 330 U.S. 731, 735, n.4, 67 S. Ct. 1009, 1011 n.4,

91 L. Ed. 1209 (1947); *Thomson v. Gaskill*, 315 U.S. 442, 446, 62 S. Ct. 673, 675, 86 L. Ed. 951 (1942); *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278, 57 S. Ct. 197, 201, 81 L. Ed. 183 (1936); *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936).

A significant purpose of the intent-to-sue notice is as follows:

> . . . the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit.

Gwaltney, supra, 484 U.S. at 60.

Against one Congressional policy objective of providing a grace period to an alleged violator to opt for voluntary compliance and thereby avoid the expense of a private citizen's enforcement action, *Gwaltney* establishes that subject matter jurisdiction exists so long as allegations of continuous and ongoing violation are made in "good-faith". *Gwaltney, supra*, 484 U.S. at 64. However, there exists no sound policy reason for the Ninth Circuit rule which requires the "good-faith" determination occur as of the date of the Notice as follows:

> Regardless of whether WaterKeepers is able to prove each claimed discharge, its intent-to-sue letter put AG Industrial on notice as to the violations that WaterKeepers would allege in its complaint. The statute and regulation require no more.

375 F.3d at 918.

The Ninth Circuit rule focusing on the date the Notice was mailed makes litigation inevitable (assuming the alleged transgressor does not want to settle by stipulating to a civil penalty award) thereby unnecessarily burdening the judicial system. Such litigation provides no immediate benefit to our natural water resources where an alleged violator has voluntarily elected to place itself into compliance with the Act and the General Permit.

In determining that subject matter jurisdiction would exist upon "good-faith" allegations in the complaint, this Court cautioned:

> Our acknowledgment that Congress intended a good-faith allegation to suffice for jurisdictional purposes, however, does not give litigants license to flood the court with suits premised on baseless allegations. Rule 11 of the Federal Rules of Civil Procedure, which requires pleadings to be based on a good-faith belief, formed after reasonable inquiry, that they are "well grounded in fact," adequately protects defendants from frivolous allegations.

Gwaltney, 484 U.S. at 65.

With due respect, Rule 11 of the Federal Rules of Civil Procedure should not be the exclusive remedy of a defendant. A motion for summary judgment which leads into the conclusion that subject matter jurisdiction did not exist and standing does not exist is an appropriate way to address whether the complaint should ever have been filed. *Steel Company*, *supra*, 523 U.S. at 94-95 held a federal court must resolve any jurisdictional doubt prior to a decision on

the merits so as to avoid a constitutionally prohibited advisory opinion as follows:

> The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception". *Mansfield, C.&L.M.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884).

Further this Court quoted from its then recent decision[9] unanimously setting aside a Ninth Circuit's merits decision where the case had lost the elements of a justiciable controversy as follows:

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer*, 293 U.S. 237, 244, 55 S.Ct. 162, 165, 79 L.Ed. 3381 (1934).

Steel Company, supra, 523 U.S. at 95. *See also Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577, 119 S. Ct. 1563, 1570-72, 143 L. Ed. 2d 760 (1999).

The issue is not whether a validly filed complaint's allegations have been rendered moot. The issue is whether the respondents could properly invoke the jurisdiction of the

---

9. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 1071-72, 137 L. Ed. 2d 170 (1997) itself quoting from *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986).

federal courts at the time the complaint was filed. No other Circuit has followed, or refused to follow, the Ninth Circuit position on the precise issue of subject matter jurisdiction being determined as of the date of the sending of the intent-to-sue notice.

It remains undisputed in their complaint, respondents accused the petitioners of failing to file a notice of intent and failing to adopt a SWPPP and storm water monitoring program. Those allegations were no longer true when the complaint was filed. Since the respondents had actual knowledge that Aim had initiated compliance efforts with the filing of Aim's notice of intent and adoption of a SWPPP which included several BMPs as well as a storm water monitoring and reporting program, to include allegations in the complaint to the contrary can never be in "good-faith". Remaining allegations in the complaint of speculative non-storm water discharge and the level of contaminants of untested storm water discharge for a facility which is not subject to any effluent limitations in the storm water which it discharges do not remotely meet the specificity of the EPA regulation governing the contents of the intent-to-sue notice and certainly do not achieve the requirement of "good-faith" so that subject matter jurisdiction can exist. The lack of sufficient notice grows when respondents' own expert witness concedes at deposition that certain rainfall data related assertions in the Notice are inaccurate.

The district court did precisely what it was supposed to do. Confronted with cross-motions for summary judgment, the district court analyzed whether subject matter jurisdiction existed. It correctly concluded that it did not. The Ninth Circuit's reversal shall lead other courts down the wrong path.

C. The EPA's Requirement that the Notice Be "Specific" Must Be Upheld So that a Determination Can Be Made that Alleged Violations of the Act Are Made in "Good-Faith".

The Ninth Circuit has also abandoned the necessity of specific information concerning: (i) the dates of violation; and (ii) the standards and orders violated. True, the Notice contains a fairly detailed reference to the General Permit and certain of its provisions. Respondents' Notice contains only very general reference to the necessity of adopting BMPs to reduce or avoid the existence of pollutants in storm water discharge. However, the Aim facility is not subject to any specific effluent limitations in storm water discharged under the General Permit. *See* Footnote 3, *supra*. The Notice does not advise what specific BMPs should be in place at the Aim facility.

The General Permit prohibits storm water discharge which causes, or threatens to cause, otherwise unspecified receiving water limitations to be exceeded. Receiving water limitations vary for each protected waterway in California and indeed may vary as to specified portions within a protected waterway. The Notice supplies no information what those limitations are with reference to the Mokelumne River. Further, through the date cross-motions for summary judgment were filed petitioners never collected a sample of storm water discharge at the point of discharge from the City of Lodi storm drain system into the Mokelumne River nor are they aware of anyone else doing so which would determine what level, if any, that discharge from the City of Lodi storm drain system would exceed receiving water limitations.

The generality of what the Ninth Circuit believes is sufficient for subject matter jurisdiction and standing shall likely render Rule 11 completely ineffective since the sender of the notice shall likely always establish that it was at least proceeding in subjective "good-faith" when the notice was sent. However, the critical time is whether "good-faith" continues to exist at the time the complaint is filed since filing the complaint marks the point in time that Rule 11 can even start to apply.

If Rule 11 is to be an effective barrier against frivolous litigation, upholding the requirement that the intent-to-sue letter contain "specific" information best serves several public policy objectives. First and consistent with due process concerns, it provides concrete information to the alleged violator who can then quickly examine its options. Next and in the context of escalating exposure to civil penalties based upon each day of violation, limiting the scope of the intent-to-sue letter to the events specified therein encourages voluntary compliance. Finally, voluntary compliance will hopefully lead to improved conditions in protected waterways while avoiding unnecessary litigation.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

THOMAS G. MOUZES*
DENNIS M. HAUSER
HAUSER & MOUZES,
A PROFESSIONAL LAW CORPORATION
18826 N. Lower Sacramento Rd.
Suite H
P.O. Box 1397
Woodbridge, CA 95258-1397
(209) 368-1368

Attorneys for Petitioners

* *Counsel of Record*